IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC. and THE UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 05-00338 (EGS)
WILLIAMS *et al*.,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CSXT'S MOTION FOR SUMMARY JUDGMENT AS TO THE TEMPORARY ACT

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INTRODUCTION AND SUMMARY OF ARGUMENT

In a per curiam opinion issued May 3, 2005, the Court of Appeals for the District of Columbia Circuit reversed this Court's denial of CSXT's motion for preliminary injunction against enforcement of the District of Columbia Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005 (the "Emergency Act"), and remanded with direction to enter a preliminary injunction prohibiting enforcement of the Emergency Act. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005). The Court of Appeals held that CSXT "had a very high likelihood of success on the merits," reasoning that the District's ban on interstate commerce of certain hazardous materials is preempted by the Federal Railroad Safety Act ("FRSA"). *Id.* at 674. Because the claim of preemption under FRSA was so strong, the Court of Appeals found it unnecessary to address the claims of preemption under the Hazardous Materials Transportation Act ("HMTA") and Interstate Commerce Commission Termination Act ("ICCTA") or the claim of invalidity under the Commerce Clause. *Id.* at 669 n.3. Judge Henderson wrote separately to express her view that the Emergency Act was also likely preempted by HMTA. Concurring Opinion, 406 F.3d at 674-75.

The Court of Appeals stated that the District of Columbia Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005 (the "Temporary Act") is "substantively identical" to the Emergency Act. 406 F.3d at 669 n.2. Under the Court of Appeals' reasoning, as explained below, CSXT is entitled to a declaratory judgment that

the Temporary Act is preempted by FRSA and HMTA and is *per se* invalid on its face under the Commerce Clause.[1]

THE GOVERNING STANDARD FOR SUMMARY JUDGMENT

Summary judgment is to be granted if the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party opposing summary judgment must offer evidence showing with specificity that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). *See also CSX Transp., Inc. v. Williams*, No. 05-338 (EGS) Memorandum Opinion and Order (D.D.C. April 18, 2005) (Dist. Op.) at 14-15.

There are no disputed issues of material fact here. This case poses purely legal issues, and "further litigation would put the parties to unnecessary expense and would also waste judicial resources." *Airlie Found., Inc. v. United States*, 826 F. Supp. 537, 548 (D.D.C. 1993) (internal quotation marks omitted).

This Court concluded in its April 18 Memorandum Opinion and Order (at 61) that summary judgment was inappropriate because the record was "devoid of the factual predicate that would support the ruling of law sought by plaintiff," such as "whether or

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[1] CSXT continues to believe, as the Surface Transportation Board ("STB") found, that the Emergency Act (and thus the Temporary Act) is also preempted by ICCTA. *CSX Transp., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (Mar. 14, 2005, as clarified May 3, 2005). CSXT also maintains its additional claim that the Council of the District of Columbia lacked the legislative authority under the Home Rule Act to pass the Emergency Act or Temporary Act. But this Court need not decide the ICCTA preemption and Home Rule Act claims because the D.C. Circuit did not address these claims and the claims that the Court of Appeals did address are sufficient to preclude enforcement of the Temporary Act. This motion is thus limited to the FRSA and HMTA preemption claims directly addressed by the Court of Appeals, and to the Commerce Clause claim which is directly intertwined with part of the analysis under FRSA and closely related to HMTA preemption.

not the federal government has 'substantially subsumed' the subject of rail terrorism or whether the District Act is an 'obstacle' to federal objectives" (referencing the court's discussion of preemption under FRSA, HMTA and ICCTA (Dist. Op. at 16-36)). In its analysis of FRSA preemption, however, the Court of Appeals determined that the federal government had "covered" the relevant subject matter based on its review of a rule proposed and then promulgated by the Department of Transportation, as published in the Federal Register. 406 F.3d at 671-72. The Court of Appeals identified no factual issue that was germane to the issue whether the federal program "covers the subject matter" within the meaning of 49 U.S.C. § 20106. *See* 406 F.3d at 671-72. Similarly, Judge Henderson identified no factual issue that would preclude summary judgment on the claim of HMTA preemption. The Court of Appeals thus addressed this Court's concern about the propriety of summary judgment. Under the Court of Appeals' analysis, CSXT's facial challenge to the Temporary Act should be decided now as there are no disputed facts that are material to the proper disposition of the case.

ARGUMENT

I. THE DISTRICT'S TEMPORARY ACT IS EXPRESSLY PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT.

The Court of Appeals analyzed in detail the express preemption provision of FRSA, 49 U.S.C. § 20106. 406 F.3d at 670-73. It fully considered and rejected all the arguments advanced by the District Defendants and Sierra Club in support of their contention that the Emergency Act fell within FRSA's exemption from preemption.[2]

[2] In this Memorandum, CSXT focuses on the Court of Appeals' May 3 decision. CSXT incorporates by reference the arguments it previously made in support of FRSA preemption, including CSXT Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction ("P.I. Mem.") at 26-33 (filed Feb. 22, 2005); CSXT

[Footnote continued on next page]

First, it is undisputed that state laws of statewide applicability are preempted by FRSA if the Secretary of Transportation or the Secretary of Homeland Security has prescribed a regulation or issued an order "covering the subject matter of the State requirement." 49 U.S.C. § 20106. The Court of Appeals analyzed whether the Secretary of Transportation's final rule, known as HM-232, addressing "Security Requirements for Offerors and Transporters of Hazardous Materials," 68 Fed. Reg. 14,510 (Mar. 25, 2003), covered the subject matter of the Emergency Act.[3] The Court of Appeals noted that the proposed rule (67 Fed. Reg. 22,028, 22,035 (May 2, 2002)) had contemplated routing restrictions but that the final rule opted for performance standards and carrier flexibility rather than routing restrictions. 406 F.3d at 671. The Court concluded:

> Because HM-232 requires a flexible, individually-tailored security plan for each hazardous materials transporter, including measures aimed at en route security, we conclude that CSXT is substantially likely to succeed on its claim that HM-232 covers the subject matter of the D.C. Act.

Id at 672.

The Court of Appeals explained that the District's argument about the Federal Government's asserted inaction misses the mark:

[Footnote continued from previous page]
Memorandum of Points and Authorities in Support of Motion for Summary Judgment (S.J. Mem.) at 11-13; CSXT's Reply Memorandum in Support of Motions for Summary Judgment and Preliminary Injunction ("Reply") at 10, 17-24 (filed Mar. 17, 2005).

[3] The Court of Appeals stated that it did not need to resolve the issue whether the District of Columbia is a "state" within the meaning of Section 20106 "[b]ecause we conclude the D.C. Act fails to satisfy the three safe harbor conditions in section 20106." 406 F.3d at 670 n.5. CSXT incorporates by reference its prior briefing in support of its argument that the District of Columbia is not a "state" within the meaning of FRSA. P.I. Mem. at 27-28; Reply at 18-20. It is undisputed that FRSA completely preempts all municipal regulation of rail safety and security.

> In effect, the District's complaint is not that the federal government has not covered the subject matter of en route security of rail transport of hazardous materials by HM-232; rather the District's charge is that HM-232 *inadequately* does so. . . . The FRSA preemption provision, however, authorizes the court *only* to determine whether the regulation covers the subject matter, leaving it to DOT or DHS to gauge the efficacy of the security measures based on the agency's expertise. Neither the court nor the District is authorized or equipped to measure off the adequacy of either agency's strategic determinations.

Id. (emphasis in original).

Second, the Court of Appeals fully analyzed the applicability of FRSA's preemption provision relating to state laws of local applicability:

> A State may adopt or continue in force an additional or more stringent law, regulation or order related to railroad safety or security when the law, regulation or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See* 406 F.3d at 672-73. The Court of Appeals concluded: "It does not appear that the D.C. Act satisfies the three conditions." 406 F.3d at 672. Indeed, the Court's analysis reveals that the Act satisfies none of the three conditions. Specifically, the Court of Appeals stated that "the D.C. Act likely does not address an 'essentially local safety or security hazard'" because the vulnerability of hazardous materials passing near the Capitol can be addressed by uniform national standards and because, as the United States "persuasively urged, '. . .[t]he need to protect the United States Capitol and its environs from terrorist attack is and could hardly be a more quintessentially national

concern.'" *Id*. The Court of Appeals next determined that the "D.C. Act appears to be 'incompatible' with HM-232" because the "D.C. Act's routing restriction does not allow a carrier operating within the Capitol Exclusion Zone to exercise the discretion expressly conferred by HM-232." *Id.* at 673. Finally, the Court stated that "it appears that the D.C. Act does 'unreasonably burden interstate commerce'" because of the obvious adverse effect of similar legislation by other jurisdictions:

> In assessing the burden, it is appropriate for us to consider the practical and cumulative impact were other States to enact legislation similar to the D.C. Act. *See* [*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774-75 (1945)] (focusing on impact of similar state legislation in striking down Arizona statute limiting train lengths as unconstitutional burden on interstate commerce). . . . As the United States asserts, "[i]t would not take many similar bans to wreak havoc with the national system of hazardous materials shipment." U.S. Mem. at 17.

Id.

The Court of Appeals summarized its analysis of FRSA preemption as follows:

> Given that the D.C. Act does not fall within the safe harbor provided in section 20106, we conclude that CSXT has a strong likelihood of success on the merits of its argument that the D.C. Act is preempted by the FRSA. We note that the case for preemption is particularly strong where, as here, "the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 107 (2000) (concluding Congress had legislated in field of international maritime commerce "from the earliest days of the Republic"); *see CSXT Transp., Inc. v. City of Plymouth,* 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000) ("There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our Nation's rail system."); *CSXT Transp., Inc. v. Pub. Utils. Comm'n of Ohio,* 901 F.2d 497, 499 (6th Cir. 1990) (discussing evolution of federal regulation of hazardous materials transportation by rail).

Id.

In short, the Court of Appeals decision makes clear both that, under the correct legal test, the Emergency Act was plainly preempted by FRSA as a matter of law, and that none of the disputed facts relied on by the District are material to the FRSA preemption question. Because the Emergency Act and the Temporary Act are indistinguishable for purposes of the FRSA preemption analysis, *see* Part IV below, the Temporary Act should be found to be preempted as a matter of law.

II. THE DISTRICT'S TEMPORARY ACT IS EXPRESSLY PREEMPTED BY THE HAZARDOUS MATERIALS TRANSPORTATION ACT.

In its April 18 decision, this Court found that the Emergency Act was "simply a gap-filling measure that is intended to minimize the risk of terror attack while the federal government contemplates authoritative action," and was thus not preempted by HMTA. Dist. Op. at 31.[4] Although the per curiam opinion of the Court of Appeals does not expressly address HMTA preemption, it does make clear that federal government has acted with respect to en route security of hazardous materials through HM-232 and that there is no gap to fill; thus, this Court's reason for rejecting HMTA preemption of the Temporary Act cannot stand. Accordingly, based on the D.C. Circuit's analysis, and because the Emergency and Temporary Acts are "substantively identical," 406 F.3d at

[4] The District Defendants and Sierra Club so argued in the Court of Appeals. Opposition by the District of Columbia Appellees to CSX Transportation's Emergency Motion for Injunction Pending Appeal or Summary Reversal (D.C. Opp.) at 2-3, 5, 8-9 (filed April 19, 2005); Supplemental Opposition by the District of Columbia Appellees to CSX Transportation's Emergency Motion for Injunction Pending Appeal or Summary Reversal (D.C. Supp. Opp.) at 1, 5, 7 (filed April 22, 2005); Opposition by Sierra Club to CSX Transportation's Emergency Motion for Injunction Pending Appeal or Summary Reversal (Corrected) (Sierra Club Opp.) at 1-2, 7-8 (filed April 25, 2005); Tr. at 41, 49-50, 58, 63 (April 27, 2005).

669 n.2, CSXT now seeks summary judgment on its additional argument that the Temporary Act is preempted by HMTA.

Judge Henderson wrote separately to express her view that "the D.C. Act is likely preempted by the Hazardous Materials Transportation Act (HMTA) [49 U.S.C. § 5125] as well as by the FRSA." 406 F.3d at 674. She reviewed the pertinent Court of Appeals decisions on HMTA preemption, all of which emphasized Congress' intent for federal development of "a uniform, national scheme of regulation." *Id.* Judge Henderson concluded that, "for the same reason the majority opinion finds the D.C. Act is likely 'incompatible with' [HM-232] under the FRSA," the D.C. Act "appears to constitute an obstacle to implementation of HM-232 and thus to be preempted under the HMTA, 49 U.S.C. § 5125(a)(2)." *Id.* at 675. Judge Henderson did not identify any factual issues that had to be resolved before this determination could be made.[5]

In its April 18 ruling, this Court relied heavily on *National Tank Truck Carriers Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982), in which the Second Circuit upheld, against HMTA preemption and Commerce Clause challenges, a fire department ban on use of the George Washington Bridge for hazardous materials truck traffic. Dist. Op. at 30. But Judge Henderson rejected the Sierra Club's reliance[6] on the *City of New York* case, and further reliance on the case cannot be supported in the face of the Court of

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[5] CSXT incorporates by reference the arguments it previously made in support of HMTA preemption, including that the Temporary Act is preempted under HMTA because it presents an obstacle to CSXT's obligation to expedite shipments of hazardous materials under 49 C.F.R. § 174.14, requires CSXT to obtain a "shipping document" that is not required by federal law, and more generally prohibits shipments which are authorized by federal law. *See* P.I. Mem. at 34; S.J. Mem. at 14; Reply at 10, 24-25.

[6] *See* Sierra Club Opp. at 11.

Appeals' decision. *First*, rather than relying upon *City of New York*, Judge Henderson instead relied upon subsequent cases from three other circuits (the Eighth, Ninth and Tenth) that do not follow the Second Circuit's reasoning.[7] As CSXT previously explained,[8] *City of New York* stands alone among a large number of DOT rulings and judicial decisions (both before and after the Second Circuit's decision) in which state and local requirements causing interstate truck traffic to detour around a jurisdiction have been held preempted by federal law. *Second*, the Second Circuit's holding was subsequently rejected by Congress in 1990 (and the New York rules at issue in *City of New York* repealed) when Congress amended HMTA to prevent one jurisdiction from unilaterally increasing the hazards on the highways of other jurisdictions in order to decrease the hazards on its own roads. Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, § 4, 104 Stat. 3248, 3251 (codified as amended at 49 U.S.C. § 5112). *Third,* even if *City of New York* remained good law as to state/local regulation of *truck* transportation, which it is not, the District Defendants and Sierra Club have not shown, and cannot show, a reason not to follow the more recent cases holding state/local restrictions of *rail* transportation of hazardous materials, with more limited routing options than truck transportation, preempted under HMTA. *See, e.g., S. Pac.*

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[7] *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comty.*, 991 F.2d 458 (8th Cir. 1993); *Chlorine Inst., Inc. v. Calif. Highway Patrol*, 29 F.3d 496 (9th Cir. 1994); *S. Pac. Transp. v. Pub. Serv. Comm'n of Nev.*, 909 F.2d 352 (9th Cir. 1990); *Colo. Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991).

[8] *See* P.I. Mem. at 35-36; Reply at 24-25.

Transp. v. Pub. Serv. Comm'n of Nev., 909 F.2d 352 (9th Cir. 1990), cited by Judge Henderson, 406 F.3d at 675.[9]

III. THE DISTRICT'S TEMPORARY ACT IS *PER SE* INVALID ON ITS FACE UNDER THE COMMERCE CLAUSE.

The Court of Appeals, in deciding the claim of FRSA preemption, also decided the legal issue underlying CSXT's claim that legislation like the Temporary Act is *per se* invalid on its face under the Commerce Clause.[10] As explained above, in assessing whether the Emergency Act "unreasonably burdens interstate commerce" for purposes of FRSA preemption, the Court of Appeals stated that "it is appropriate for us to consider the practical and cumulative impact were other States to enact legislation similar to the D.C. Act." 406 F.3d at 673. From that legal principle it follows inexorably that local restrictions like the Temporary Act are on their face, and by their very nature, unreasonable burdens on the interstate transport of hazardous materials by rail.[11] The Court of Appeals concluded that such bans would "wreak havoc with the national system

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[9] In addition, the Second Circuit's Commerce Clause analysis is at odds with the D.C. Circuit's decision in this case because the Second Circuit declined to decide the fundamental question whether New York City could permissibly increase hazardous materials truck traffic through northern New Jersey and Westchester County, New York "without their political participation"; the court questioned whether the interests of those other communities could be considered without their participation in the case as parties. 677 F.2d at 274. No party in this case, however, has suggested that additional parties are necessary to decide CSXT's claims, and the D.C. Circuit believed that it was proper to take the interests of other communities into account. 406 F.3d at 674 ("The effect of the D.C. Act, however, is simply to shift this risk, or at least some of this risk, to other jurisdictions.").

[10] CSXT incorporates by reference the arguments it previously made in support of its claim that the Temporary Act is *per se* invalid on its face under the Commerce Clause, including P.I. Mem. at 21-24; S.J. Mem. at 15-16; Reply at 10-11, 28-34.

[11] *See, e.g., Edwards v. California*, 314 U.S. 160, 176 (1941), in which the Supreme Court concluded that "the prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative."

of hazardous materials shipment." *Id.* Nothing in that determination requires any further factual development or could be undermined by any specific facts.

The District Defendants and Sierra Club defended the Emergency Act before the Court of Appeals as a legitimate exercise of local police powers designed to protect D.C. residents, workers and visitors from a threat to their safety.[12] But in evaluating the Emergency Act's burden on interstate commerce, the Court of Appeals did not accept the argument that the purpose of the Emergency Act – protection from terrorism rather than economic protectionism – insulated the Emergency Act against a challenge of interference with interstate commerce. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. at 780 (state cannot avoid the Commerce Clause by "simply invoking the convenient apologetics of the police power"). Indeed, the Court of Appeals noted to the contrary that the case for federal authority "is particularly strong where, as here, 'the State regulates in an area where there has been a history of significant federal presence.'" 406 F.3d at 673 (*quoting United States v. Locke*, 529 U.S. 89, 107 (2000)).[13]

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[12] D.C. Opp. at 2-3, 5, 8-9; D.C. Supp. Opp. at 1, 5, 7; Sierra Club Opp. at 4, 14-15; Tr. at 41, 46, 58-59 (April 27, 2005).

[13] This Court relied on the D.C. Circuit's decision in *Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984), in which the Court of Appeals decided that the District could permissibly prohibit the possession of radar detectors within the District. Dist. Op. at 54-55. In that case, however, the Court of Appeals expressly stated that it was not deciding the different question whether the District could prohibit an interstate shipment of radar detectors through the District. 737 F.2d at 113 (recognizing the District of Columbia's agreement that it would not enforce the law as applied to a "truck carrying a shipment of new radar detectors through the District to a retailer in another state"). That is the question analogous to the question presented here.

IV. BECAUSE THE DISTRICT'S TEMPORARY ACT CANNOT BE DISTINGUISHED FROM THE EMERGENCY ACT, THE COURT OF APPEALS' DECISION COMPELS THE CONCLUSION THAT THE TEMPORARY ACT IS INVALID.

There is no material legal or factual distinction between the Emergency Act and the Temporary Act. The District Defendants have suggested that congressional inaction during the 30-day layover period provided in D.C. Home Rule Act § 602(c)(1) (codified as D.C. Code § 1-206.02(c)(1)) is equivalent to affirmative congressional approval of the Temporary Act, thus abrogating CSXT's and the United States' claims of invalidity.[14] However, under *INS v. Chadha*, 462 U.S. 919 (1983), settled principles of statutory construction and the Home Rule Act, congressional inaction simply does not constitute affirmative congressional action. If the District were correct, congressional inaction during the layover period would insulate all District acts from federal preemption and dormant Commerce Clause challenges, but the United States Supreme Court, the D.C. Circuit and the District of Columbia Court of Appeals have never given such effect to the layover period. In considering such challenges to District acts, those courts have not suggested that the layover period is relevant in any way. As explained below, an affirmative enactment of Congress, not simply inaction, is required to abrogate the express preemption provisions of federal statutes and to constitute an exercise of Congress' plenary authority over interstate commerce. There is no affirmative congressional action here.

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[14] Section 602(c)(1) of the Home Rule Act provides that District acts (other than budget acts, emergency acts and charter amendments) must be presented to Congress for a 30-day layover period before they become effective. If during that period both Houses of Congress pass a joint resolution disapproving such District act and present the joint resolution to the President, the District act does not take effect. The 30-day layover period expired on or about May 12, 2005, without a congressional joint resolution of disapproval, and the Temporary Act took effect.

As the Court of Appeals and the District have correctly stated, the Temporary Act is "substantively identical" to the Emergency Act, 406 F.3d at 669 n.2, Tr. of Oral Argument 47 (D.C. Cir. Apr. 27, 2005), and both are preempted for the same reasons. Congress' failure to block the Temporary Act through a joint resolution does not insulate it from the express preemptive provisions of federal statutes or from the reach of the dormant Commerce Clause for several reasons.

First, an affirmative act of Congress is required to abrogate the express preemption provisions of FRSA and HMTA (as well as ICCTA) and to constitute an exercise of Congress' plenary authority over interstate commerce. The Supreme Court has already held a unicameral legislative veto provision (allowing a single House to reverse an executive branch decision) unconstitutional because it purports to enact federal law without fulfilling the requirements of Article I of the Constitution that both houses pass a bill and present it to the President for signature or veto. *See INS v. Chadha*, 462 U.S. 919, 955 (1983). Conferring upon the Temporary Act the status of a federal statute based merely on *congressional inaction* would be even more obviously unconstitutional than the one-house legislative veto at issue in *Chadha*.

Moreover, cases interpreting "report-and-wait" or "layover" provisions much more generous than the one at issue here (*e.g.*, Rules Enabling Act, 28 U.S.C. § 2074(a) (7-month layover); Sentencing Reform Act, 28 U.S.C. § 994(p) (6-month layover)) have expressly held that congressional inaction does not constitute affirmative enactment of the underlying law or rule at issue. *See Walko Corp. v. Burger Chef Sys., Inc.*, 554 F.2d 1165, 1168 n.29 (D.C. Cir. 1977) ("Congress' failure to suspend a proposed rule [under the Rules Enabling Act] gives [the rule] the force not of a legislative enactment, but of a

regulation pursuant to the Act."); *Founding Church of Scientology v. Bell*, 603 F.2d 945, 952 (D.C. Cir. 1979) ("Although proposed rules may be rejected by Congress, they are not affirmatively adopted by the legislature, as all statutes must be."); *United States v. Scampini*, 911 F.2d 350, 353-54 (9th Cir. 1990) ("Congressional silence during the six month 'examine and consider' period [applicable to the Sentencing Guidelines] is not legislative in character and effect.").

There are also numerous cases addressing whether District laws subject to the congressional layover are preempted by pre-existing federal statutes and whether District laws violate the Commerce Clause. *See, e.g.*, *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (D.C. Workers' Compensation Equity Amendment Act of 1990 was preempted by ERISA, enacted in 1974); *Doe v. Stephens*, 851 F.2d 1457, 1464-65 (D.C. Cir. 1988) (D.C. Mental Health Information Act was preempted by the Veterans' Records Statute of 1958, now codified at 38 U.S.C. 5701 *et seq.*); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (analyzing whether the Assault Weapon Manufacturing Strict Liability Act of 1990 violates the dormant Commerce Clause). This analysis would be wholly unnecessary if congressional inaction amounted to federal ratification of a District law, and in none of these cases did the court even mention congressional inaction during the layover period as relevant in any way.

Second, even conceived as a tool of statutory construction, congressional inaction during the brief layover period does not signal congressional approval of District legislation. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (quotations and footnote omitted); *United States v.*

Wells, 519 U.S. 482, 496 (1997) ("[W]e have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (quotations and citation omitted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) ("Congress does not express its intent by a failure to legislate, and even if it did, the will of a later Congress as to the meaning of a law enacted by an earlier Congress is of little weight.") (citations omitted).

There are numerous reasons other than approval to explain why Congress might not act during a layover: "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency*, 531 U.S. at 170. The press of other legislative business may often be one reason. *See, e.g.*, *Indep. Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1169 n.15 (D.C. Cir. 1979) ("time constraints"). Congressional inaction with respect to the Temporary Act may well be based on Congress' belief that no further action is needed given (1) the May 3, 2005 decision of the Court of Appeals, (2) the Surface Transportation Board decisions that the Emergency Act is preempted by ICCTA,[15] and (3) the Department of Justice's position that both the Emergency and Temporary Acts are federally preempted and violate the Commerce Clause.

Third, Congress simply does not regard its inaction during the 30-day layover period as ratification of District legislation. In Section 601 of the Home Rule Act

[15] *CSX Transp., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (March 14, 2005, as clarified May 3, 2005).

(codified at D.C. Code Ann. § 1-206.01), Congress has expressly reserved its right to legislate *at any time* with respect to the District. Thus, the 30-day layover period of temporary District legislation presents a special window of opportunity for Congress to halt District legislation even before it goes into effect, but Congress retains a "myriad of other controls, such as the plenary authority of Congress under art. I of the Constitution, [and] control over the budget" to ensure its oversight and ultimate authority over the District. *Gary v. United States*, 499 A.2d 815, 830 (D.C. 1985). The structure of the Home Rule Act itself thus makes emphatically clear that no implication of congressional approval should be drawn from Congress' inaction during the layover period.[16]

In sum, neither ratification nor even modest approval can be imputed to congressional inaction with respect to the Temporary Act. Accordingly, the Court of Appeals' decision directing entry of a preliminary injunction against the Emergency Act logically compels the conclusion that CSXT is entitled to summary judgment and a permanent injunction against enforcement of the Temporary Act.

CONCLUSION

For the reasons set forth above, this Court should grant CSXT's Motion for Summary Judgment as to the Temporary Act.

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[16] In fact, Congress often exercises its reserved authority to legislate for the District through the budget process by attaching legislative provisions as riders to appropriation bills. From 1975 until 1990, Congress used appropriation riders to legislate for the District on more than 75 separate occasions. Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, 314 (1990). In contrast, Congress has only once passed a joint resolution – disapproving the Schedule of Heights Amendment Act of 1990, D.C. Act 8-329. *See* Act of Mar. 12, 1991, Pub. L. No. 102-11, 105 Stat. 33 (1991).

Respectfully submitted,

Dated: June 24, 2005

/s/ Mary Gabrielle Sprague

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2005, copies of CSXT's Motion for Summary Judgment as to the Temporary Act, Memorandum of Points and Authorities in Support of CSXT's Motion for Summary Judgment as to the Temporary Act, and Statement of Material Facts as to Which There Is No Genuine Dispute in Support of CSXT's Motion for Summary Judgment as to the Temporary Act were served electronically by the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF), on the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 05-00338 (EGS)
	)	
WILLIAMS *et al.*	)	
	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiff CSXT's Motion for Summary Judgment as to the Temporary Act it is by the Court this _____ day of _____, 2005,

ORDERED that Plaintiff's Motion is hereby GRANTED.

_____

EMMET G. SULLIVAN
United States District Judge

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